

No. 15024

In the
United States Court of Appeals
For the Ninth Circuit

GEORGE WESLEY STONE and HIL-
DEGARDE W. STONE,

Appellants,

vs.

JACK W. S. FARNELL and ELISA-
BETH PATTEE FARNELL,

Appellees.

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Petition for Rehearing
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*To the Honorable United States Court of Appeals for
the Ninth Circuit, and to the Honorable Stanley N.
Barnes and Frederick Hamley, Circuit Judges, and
John Ross, District Judge:*

Appellants, GEORGE WESLEY STONE and
HILDEGARDE W. STONE, herein referred to as
vendors, respectfully petition for a rehearing in the
within matter upon the following grounds:

I.

THERE IS NO FINDING OF FACT IN THE MEMORANDUM OPINION OF THE HONORABLE BEN HARRISON, BEFORE WHOM THIS CAUSE WAS TRIED IN THE DISTRICT COURT, THAT VENDORS WERE NEGLIGENT IN MAKING THE REPRESENTATIONS CONCERNING THE BOUNDARIES OF THE PROPERTY AND THE LOCATION OF THE IMPROVEMENTS THEREON.

This Honorable Court, at page 5 of its decision, concedes that a finding and evidence of negligence is essential. At page 6 it correctly states that there is no such Finding of Fact in the record. We do not agree that the omission is supplied by the Memorandum Opinion of the court below. We are unable to discover anything in the Memorandum Opinion which amounts to a finding that the vendors were negligent in making the representations complained of. The most that can be said in this regard is that Judge Harrison stated as a Conclusion of Law that the vendors committed actual and constructive fraud. This is not a Finding of Fact and is not in compliance with Rule 52(a).

II.

THE COURT HAS NOT CONSIDERED POINT III OF APPELLANTS' BRIEF THAT "ALTHOUGH HONEST BELIEF OR LACK OF KNOWLEDGE IS NOT A DEFENSE IN AN ACTION FOR RE-SCISSION BASED ON FRAUD, A DIFFERENT RULE APPLIES IN AN ACTION FOR DAMAGES. AUTHORITIES INVOLVING ACTIONS IN RE-SCISSION ARE THEREFORE NOT IN POINT."

This subject is discussed commencing at page 38 of appellants' brief. As there stated, this is an action at law to recover damages for fraud and deceit. It is not an action for rescission based on fraud. The vendees, of course, were entitled to elect to sue at law for damages for deceit rather than in equity for rescission. However, in an action for deceit, as distinguished from rescission, the vendors' honest belief or lack of knowledge is a complete defense. This is the rule in the Federal Courts as well as in California. See *Woods-Faulkner & Co. v. Michelson*, 63 Fed. (2) 569, [C.C.A. 8th Cir. Feb. 17, 1933], and *Kimber v. Young*, 137 Fed. 744, 747, cited at pages 40 and 41 of appellants' brief. As stated in *Kimber v. Young*:

"While the elements essential to sustain an action at law for fraud and deceit are sufficient to sustain a suit in equity for rescission of the contract of sale, the converse of this statement is not true. Even an innocent misrepresentation is sufficient to sustain an action to rescind, while, *to sustain an action for damages for fraud and deceit, the representation must have been actually fraudulent, involving moral delinquency.*" (Emphasis added.)

The Court has given no consideration to the difference in the degree and kind of proof required in an action at law to recover damages for fraud and deceit, as in the instant case, as distinguished from an action in equity for rescission. As stated in *Kimber v. Young*, “to sustain an action for damages for fraud and deceit, the representation must have been actually fraudulent, involving moral delinquency.” No such facts are disclosed by the record before this court. On the contrary, the undisputed evidence is that the vendors honestly believed their representations to be true and had no knowledge to the contrary. See point II of appellants’ brief commencing at page 24.

Nor is there a Finding of Fact that the vendors lacked an honest belief in the truth of their representations. See point I of appellants’ brief commencing at page 21. Nor can such a finding be found in the Memorandum Opinion of the District Court. In fact, Judge Harrison, in his remarks at the close of the trial (transcript p. 150 et seq.) did not question the honesty or sincerity of the vendors, and attributed the entire controversy to “an unfortunate mistake”. (transcript p. 150). As stated at page 5 of this court’s decision, the absence of a finding on the reasonableness of the vendors’ belief is reversible error. *Williams v. Spazier*, 134 C.A. 340, 25 P. 2d 851, cited in appellants’ brief, p. 26 et seq.

III.

THE COURT HAS NOT CONSIDERED POINT VI OF APPELLANTS' BRIEF THAT "THE EVIDENCE AT BEST SHOWS THAT APPELLANTS WERE MISTAKEN AS TO THE BOUNDARIES OF THE PROPERTY AND THE LOCATION OF THE IMPROVEMENTS. AN ALLEGATION OF FRAUD IS NOT SUSTAINED BY PROOF OF MISTAKE."

This point is treated at pages 55 and 56 of appellants' brief. As there stated, it was stipulated in the trial court that there had been a mistake as to the boundaries, and as stated above, Judge Harrison himself attributed the entire controversy to "an unfortunate mistake". As was held in *Mercier v. Lewis*, 39 Cal. 532, referred to at page 56 of appellants' brief, an allegation of actual fraud is not sustained by proof of mistake.

It is respectfully submitted that a rehearing should be granted to give further consideration to the fact that even though this court may consider the Memorandum Opinion of the District Court, that even so the said opinion contains no finding as to the reasonableness of the vendors' belief, or of negligence in making the representations, which this Honorable Court has stated is essential; to consider the authorities cited in point III of appellants' brief holding that although honest belief or lack of knowledge is not a defense in an action for rescission, it is a complete defense in an action at law to recover damages for fraud and deceit;

and further, to consider point VI of appellants' brief that allegations of fraud are not sustained by proof of mistake.

Respectfully submitted,

LEO SHAPIRO

Attorney for Appellants

I hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded, and that it is not interposed for delay.

LEO SHAPIRO

Attorney for Appellants